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No. 90-297

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1990

PORTER H. MITCHELL,

Petitioner,

vs.

MOBIL OIL CORPORATION, et al.
a New York Corporation,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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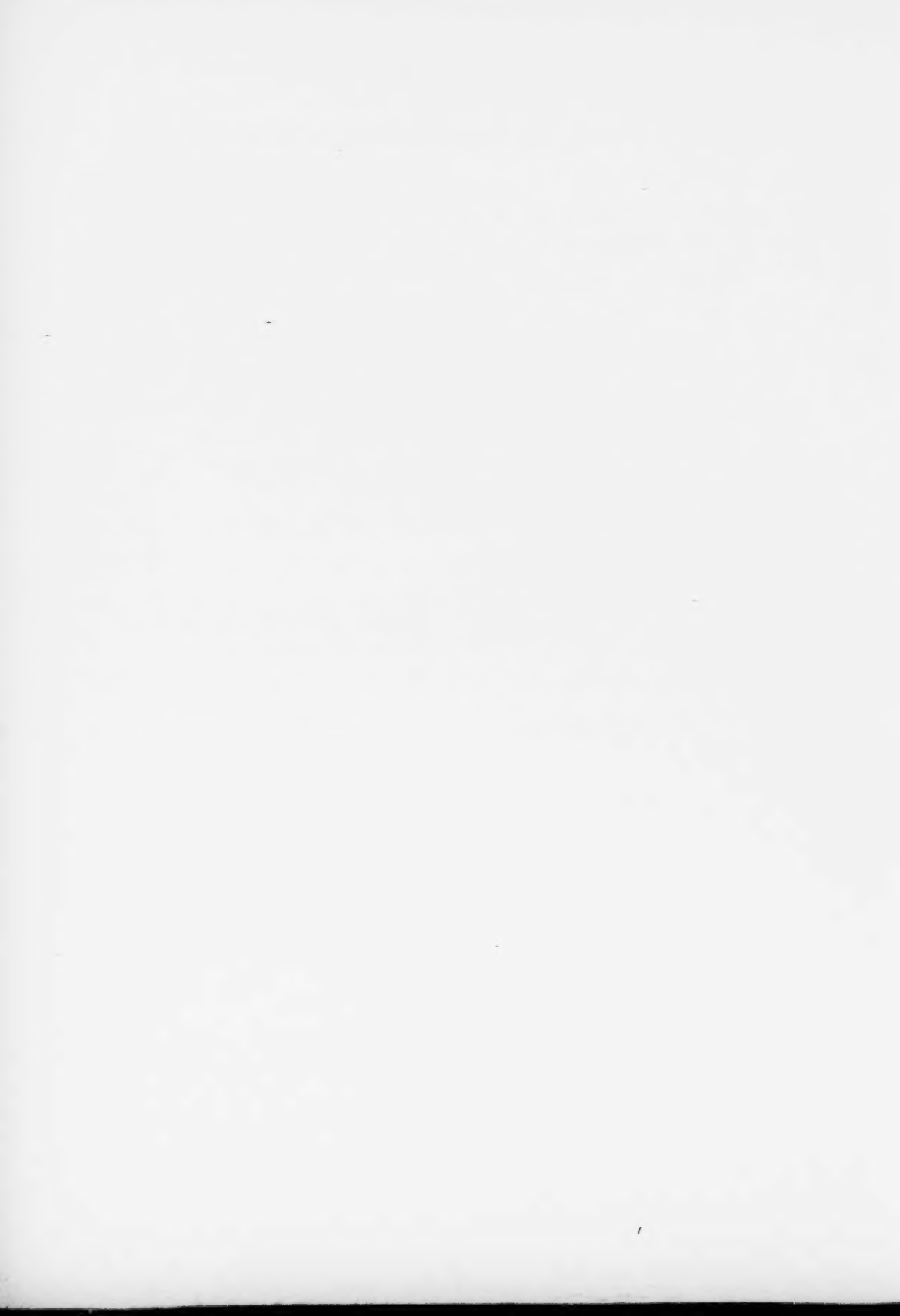
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PETITIONER'S REPLY BRIEF

Mobil's varnished description of the case bears little resemblance to the case actually tried in the district court, reviewed by the court of appeals, and now before this Court. Contrary to the first sentence in Mobil's Brief, a pension-plan change that a properly instructed jury and the court of appeals found had resulted in the constructive discharge of more than 1,000 older workers cannot fairly be characterized as "routine." Mobil's statement that Mitchell "chose to retire" flies in the face of the jury's verdict, the district court's findings of fact, and the Tenth Circuit's conclusion that Mitchell and others were constructively discharged because of their age. App. 9. And the fact that one of the discharged employees was replaced by an older worker is irrelevant to a case not based on animus directed specifically to Mitchell by his immediate supervisors but rather based on corporate-wide discrimination against a large class of workers aged 55 and older.

It is not Petitioner's position that an employer may never amend its pension plan to adjust for inflation. Petitioner does contend, however, that an employer violates both ADEA and ERISA when it makes plan changes via a method which it knows will result in the forced retirement of more than 1,000 older workers and knows of alternative methods for adjusting for inflation.

Nor did the court find that Petitioner presented no evidence of age discrimination. Brief at 6. Rather, it found "disingenuous" Mobil's contention that the 6-month retirement "window" was an "extra benefit" not available to younger workers (App. 7) and held that Mobil's plan manipulations were "exactly the type" which this Court did not intend to insulate in *Betts*.¹

¹ *Public Employees Retirement Sys. of Ohio v. Betts*, 490 U.S. ___, 109 S.Ct. 2854 (1989).

The court's ultimate conclusion that a directed verdict on the age claim should have been entered was based *solely* upon its mistaken belief that Mobil offered business reasons which were not shown to be pretextual by Mitchell, not on any conclusion that Mobil's plan changes did not constitute constructive discharge because of age.

Mobil's opposition brief deflects and avoids the central issues in this petition. Remarkably, it defends the opinion below as if it were the product of a bench trial in the court of appeals. It points to bits of evidence to support the opinion as if the circuit were the fact finder, not a reviewing court, and ignores the evidence underpinning the jury's verdict. If this case had been tried as a bench trial to the Tenth Circuit and this proceeding were a direct appeal, then Mobil's brief might make some sense. That, however, is not the case.

In terms of legal error, the court of appeals refused to apply disparate impact analysis to what was admittedly an impact case and analyzed evidence of disparate treatment in a linear fashion previously condemned by this Court.

JURISDICTION

Petitioner could not disagree more strongly with Respondent's statement that the court denied Petitioner a new trial. Since the opinion did not expressly state (App. 24) what relief (new trial or judgment) will be afforded Mobil on remand, Petitioner asked the court to "clarify" its intent by specifying that a new trial be ordered since Mobil did not move for judgment n.o.v. In denying the motion for clarification without explanation, the Tenth Circuit did not refuse to order a new trial but simply refused to specify the contents of its mandate in advance. The issue is thus not ripe for consideration by this Court.

REASONS FOR GRANTING THE WRIT

- A. The Court Of Appeals Failed To Apply An Impact Analysis To This Impact Case As Required By *Wards Cove*, Other Decisions Of This Court, And By Instruction No. 13 Which Governed The Case.

Despite the fact that this case was tried and the jury instructed on a disparate impact theory, the Tenth Circuit failed to apply an impact analysis. The opinion does not even mention *Wards Cove*,² nor does it address the tests of pretext set forth in Instruction No. 13 (App. 49-50) (whether the challenged changes furthered the reasons alleged or whether less onerous alternatives were available) pursuant to which the jury evaluated the evidence. Without citing the cases by name, the court applied a *McDonnell/Burdine*³ disparate treatment analysis, and in so doing, viewed the "pretext" issue only on the indirect "unworthy of credence" basis, and further compounded its error by concluding that Mitchell's only offer of pretext was the Superior Oil merger.

In Section B of its brief, Mobil deals with this fundamental flaw by a tautology. "Less onerous alternatives," Mobil suggests, is merely another way of saying "pretext." Since pretext also means "unworthy of belief," the court necessarily analyzed the "less onerous alternative" standard. Further, the Superior Oil evidence could relate only to an "unworthy of belief" indirect method of proving pretext and can have no bearing on the impact tests of pretext set forth in Instruction No. 13.

The Tenth Circuit looked to the wrong evidence and failed to analyze pretext as required in an impact case. As

² *Wards Cove Packing Co. v. Atonio*, 490 U.S. ___, 109 S.Ct. 2115 (1989).

³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

shown below, when the correct evidence is viewed in light of the correct tests, it was well within the jury's province to find age discrimination by rejecting Mobil's reasons or finding them pretextual.

1. When The Reasons Articulated By Mobil Are Examined In Relation To The Challenged Practices, The Changes Do Not Carry Out The Alleged Purposes.

a. The Plan Changes. The lump sum strategy consisted of three plan changes: (1) the interest rate was raised from 5 to 9.5%; (2) the threshold was raised from \$250,000 to \$450,000; and (3) a 6-month "window" which required employees with more than \$250,000 but less than \$450,000 in net worth or plan benefits to elect premature retirement to preserve the lump sum or to remain employed but forfeiting that benefit.

b. Mobil's "Justifications." The *only* justification offered by Mobil in its motion for directed verdict was the "improvident investor" theory. App. 25-31. The Tenth Circuit failed altogether to address this "justification."⁴ Had it done so, however, it would have

⁴ This was, however, the *only* reason it could legitimately address. Fed. R. Civ. P. 50(a) provides that a motion for directed verdict "*shall state the specific grounds therefor.*" (Emphasis added). Motions for direct verdict cannot be granted on grounds not stated therein. *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1, 3 (1st Cir. 1977). 9 Wright & Miller, Federal Practice and Procedure: Civil § 2536 at 595, § 2533 n. 83 (1971). Mobil's suggestion (Brief at n.7) that its counsel had "no occasion" to set forth all its grounds for a directed verdict is simply untrue. The trial court in no way prevented counsel from making a record (App. 25-29), nor did counsel attempt to rectify any perceived deficiency in Mobil's record at the close of all the evidence. App. 30-31. The Tenth Circuit's power to analyze the sufficiency of the evidence was restricted to the ground stated in Mobil's motion for directed verdict – the "improvident investor" theory – a ground it totally ignored.

necessarily sustained the jury's rejection of this reason, assuming it could be considered a business justification (App. 27). Mobil's own witnesses testified that the changes not only did *not* carry out this so-called business purpose, they directly derogated from it. See Adams' Testimony, Pet. at 23; R. Vol. X at 935-38. For example, rather than preventing employees from retiring with less than \$250,000 in 1977 dollars, the changes, by Mobil's own predictions, caused exactly that to happen for more than 1,000 employees.

Moreover, the Tenth Circuit relied on two alleged business reasons ("plan drain" and "fairness") never asserted by Mobil in its motion. Both are clearly pretextual when measured by the impact standards of Instruction No. 13. The changes did not prevent the "plan drain," but to the contrary, caused (as Mobil knew would happen) more than 1,000 persons to withdraw some \$350,000,000 from the plan in 1984 alone. More assets would be depleted sooner than under any other available alternative. The jury was well within its province in rejecting this reason.

Nor can the "window" be considered "fair." As Mitchell argued and the Tenth Circuit recognized (App. 7-8), the window did not (as Mobil "disingenuously" argued) give the employees an "extra benefit," but "created" the "choice between two options either of which would leave Mr. Mitchell worse off than he had been prior to the change in the Plan." App. 7. For all its superficial appeal, the "window" was, in fact, the very engine which drove the discriminatory scheme. How can the very device which caused the "constructive discharge" of Petitioner and more than 1,000 employees be looked upon as "fair"? The jury certainly could find it unfair.

2. The Court Ignored Evidence Of Less Onerous Plan Change Alternatives.

The Tenth Circuit does not mention the "acceptable alternative practice" measure of pretext contained in Instruction No. 13 and overlooked the wealth of evidence of available alternatives with less discriminatory impact.

First, as the trial court found (App. 38), Mobil could have grandfathered the lower threshold.

Second, as Adams testified, raising the interest rate alone would have lessened the demand for lump sum retirements.

Third, elimination of the threshold altogether, as most of Mobil's competitors had done and as Mobil was required by law to do within months of the employee exodus, would have prevented forced retirements altogether.

Fourth, Mobil could have made the IRS-mandated waiver provision known and available to the employees. As a condition of continued favorable tax treatment, the IRS required Mobil to include a waiver provision in the plan to allow employees to seek relief from the new \$450,000 threshold. R. Vol. X at 925-26. Mobil did so but withheld this fact from its work force during the window period -- the only time it could have made a difference -- and waited many months after the mass exodus to divulge the waiver's existence. As the trial court found as a matter of fact (App. 35-36) and as the jury was free to conclude, Mobil misled its older employees by deliberately choosing *not* to reveal the waiver. Contrary to Respondent's suggestion (Brief at 5), Mobil clearly could have guaranteed Petitioner's lump sum through the waiver provision.

Fifth, Mobil could have implemented a bona fide early retirement plan with financial incentives and have avoided any discriminatory impact.

Finally, Mobil *could have accomplished its purposes* of "fairness," preventing "plan drain," and protecting "improvident investors" *by refraining from imposition of the window* and thus eliminating the discriminatory Hobson's choice. With no "window," there would have been no forced departure of more than 1,000 employees into the marketplace with less than \$250,000 in adjusted dollars, nor an extraordinary \$350,000,000 drain on the plan in 1984.

3. The Court's Analysis Was Plainly Wrong.

Respondent argues, in essence, that the court of appeals must have engaged in a reasoned analysis of Mobil's asserted business reasons simply because it was supposed to. Its opinion, however, is devoid of any such "reasoned analysis." None of the evidence presented above was addressed anywhere in the opinion.

The fact is that the Tenth Circuit engaged in no "reasoned analysis" of Mobil's proffered justifications on an impact basis insofar as they related to the challenged practices. Rather, it accepted them on their face, recited them in a vacuum, implicitly determined without analysis that no reasonable fact finder could reject them, viewed them through the prism of an indirect treatment analysis, and for good measure, examined them under the wrong tests according to the wrong evidence. This, alone, compels reversal.

B. The Court of Appeals Misapplied the *McDonnell/Burdine* Approach, Ignored Petitioner's Direct Evidence Of Pretext And Usurped The Jury's Province.

Contrary to respondent's contention (Brief at 8) that *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711

(1983), "has nothing to do with this case," *Aikens* clearly applies to ADEA cases. *Aikens* directs that, after an ADEA case has been fully tried, a court of appeals should proceed directly to the ultimate issue of discrimination, considering *all* the evidence. Respondent points out (Brief at 9 n.6) that many courts of appeal in addition to the Tenth Circuit also persist in applying the three-step *McDonnell/Burdine* analysis to fully tried ADEA cases. The fact that numerous courts of appeal are ignoring *Aikens* argues for, rather than against, the grant of certiorari.

Mobil conspicuously fails to address Petitioner's argument that the verdict was also supported by direct evidence of discrimination and pretext. Pet. at 25-26. See also, *EEOC v. Westinghouse Elec. Corp.*, 907 F.2d 1354, 1363 (3d Cir. 1990) (pressuring older workers to choose retirement by misleading them about options may violate ADEA); *Baker v. Sears, Roebuck & Co.*, 903 F.2d 1515, 1523 (11th Cir. 1990) (a policy of forcing older, more highly compensated employees to "choose" retirement involuntarily can constitute direct evidence of age discrimination).

In jumping, without analysis, to the conclusion that Mitchell did not offer sufficient evidence to rebut Mobil's "plan drain" and "fairness" reasons, the Tenth Circuit usurped the jury's function by depriving it of the right to reject Mobil's alleged reasons in the first instance. Cf. *Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 677 (10th Cir. 1990) (sustaining plaintiff's ADEA verdict because "the jury was entitled to disbelieve [the employer's] proffered reasons or infer that age was also a determining factor in the decision . . . "); *Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 207-208 (5th Cir. 1986) (jury is free to weigh credibility and disbelieve employer's self-serving testimony); *Hagelthorne v. Kenicott Corp.*, 710 F.2d 76, 83 (2d Cir. 1983)

(judgment n.o.v. properly denied where defendant's evidence was not "so great as to compel acceptance"). See also, *Harris v. Marsh*, 679 F.2d 1204, 1282-85 (E.D.N.C. 1987); *EEOC v. Sandia Corp.*, 639 F.2d 600, 622-23 (10th Cir. 1980).

When an ADEA plaintiff presents a prima facie case of discrimination because of age (which Mitchell did) and when that case includes discrediting of defendant's business reasons by cross-examination of the employer's officers, that case is sufficient in and of itself to support a verdict of discrimination if for no other reason than that the jury is free to disbelieve the defendant's alleged business reasons. When that occurs, the prima facie case has *not* been rebutted and the inference of discrimination carries the plaintiff's burden. See Notes, Fed. R. Evid. 403.

C. The Tenth Circuit's Reading of *Firestone* To Deny Petitioner Standing Under Section 510 Creates A Split Among the Circuits.

Contrary to Mobil's statements, Petitioner did prevail on his Section 510 claim. As the Tenth Circuit recognized, the District Court found in favor of Petitioner on "all of his ERISA claims." App. 21 & 38. The trial court thus found that Mobil had interfered with Petitioner's attainment of a right to which he was entitled under the retirement plan, placing him squarely within the class of persons protected by Section 510.

The Tenth Circuit's application of *Firestone* to deprive Petitioner of standing to state a Section 510 claim directly conflicts with *McLendon v. Continental Can Co.*, 908 F.2d 1171 (3d Cir. 1990). As the Third Circuit held, individuals who prove a Section 510 violation by showing that the prohibited conduct interfered with plan rights have

standing under ERISA. The Third Circuit extended standing to employees and affected individuals who could not prove that they were pension plan participants, a result directly contrary to the Tenth Circuit's extension of the *Firestone* standing requirements.

The trial court's determination that Mitchell would have worked and accrued retirement plan benefits for an additional four years but for his constructive discharge provides compelling support for the *McLendon* rationale. Otherwise, Section 510 is rendered a nullity since, by its own terms, it expressly applies to that class of individuals who have been deprived of participant status by the prohibited acts of the employer and others. Mitchell, having "prevail[ed] in a suit for benefits," is clearly entitled to standing for his ERISA claims. *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 945, 958 (1989).

CONCLUSION

For the special and important reasons described in his Petition and this Reply Brief, Petitioner respectfully requests this Court to exercise its discretion to grant a writ of certiorari to the Tenth Circuit Court of Appeals.

Respectfully submitted,

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